

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
IN RE: NEW ENGLAND)	
COMPOUNDING PHARMACY, INC.)	
PRODUCT LIABILITY LITIGATION)	MDL No. 13-2419-RWZ
)	
This Document Relates To:)	
)	
All Actions)	
_____)	

**MEDICAL SALES MANAGEMENT INC.’S AND MEDICAL SALES
MANAGEMENT SW INC.’S OPPOSITION TO THE ST. THOMAS ENTITIES’
MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS
PRODUCED AS CRIMINAL DISCOVERY TO INDIVIDUAL DEFENDANTS
IN THE CRIMINAL MATTER AND
CROSS-MOTION FOR PROTECTIVE ORDER**

Medical Sales Management Inc. and Medical Sales Management SW (collectively “MSM”) hereby oppose the St. Thomas Entities’ Motion to Compel Medical Sales Management, Inc. to Produce Certain Documents (Document No. 2248).

A. St. Thomas’ Motion to Compel Production of Certain Documents Produced As Criminal Discovery to Individual Defendants In The Criminal Matter Should Be Denied.

As this Court is aware, through their Opposition By The Unites States to the St. Thomas Entities’ Motion to Compel Medical Sales Management Inc. to Produce Certain Documents Produced in Criminal Discovery (Docket 2273), the government has also requested that this Honorable Court deny St. Thomas’ Motion to Compel Medical Sales Management, Inc. to Produce Certain Documents. MSM submits that two of the government’s arguments are particularly noteworthy. First, “[t]he government produced discovery in the criminal case to the criminal defendants – which do not include MSM.” (*Id.* P. 1). As such, the materials the St. Thomas Entities seek are simply not in MSM’s possession,

custody, or control. Second, with respect to the St. Thomas Entities' argument that they seek materials that "once belonged to MSM, which the government seized pursuant to search warrants and have since 'returned' to the company See Mem. in Support of Motion to Compel MSM, at 3, 5 (Document No. 2249). They are wrong." (*Id.* P. 3).

The import of both of these points should cause this Court to deny the St. Thomas Entities' motion, without the necessity of hearing oral argument on this motion. The government produced discovery only to the criminal defendants; MSM is not one of the criminal defendants; *A Fortiori*, MSM does not possess, control or have custody of materials produced by the government in the context of criminal discovery. Moreover, the government has clearly stated that it has "not returned evidence it seized pursuant to search warrants to anyone." (*Id.*) Therefore, a central premise of St. Thomas' argument is plainly incorrect.

In addition, once again the St. Thomas Entities' citation to case law is thin and inapplicable. St. Thomas cites Flagg v. City of Detroit 252 F.R.D. 346(2008) and Ridell v. Brooks, et al, 158 F.R.D. 555(1994) for the proposition that various documents which St. Thomas incorrectly claims were "returned to MSM's owner (sic) directors and managers as a result of criminal discovery" (St. Thomas' Motion To Compel MSM to Produce Certain Documents P. 5) are "unquestionably in MSM's possession, custody and control" (*Id.* P. 6). However, the facts and issues raised in these cases are not similar to the facts and issues presented in the instant matter.

In Flagg, the issue was whether the City of Detroit had possession, custody and control of text messages preserved by a third-party provider, with whom the city had a contractual relationship. MSM submits that the facts of the case before the Court are so obviously different

that this Court should treat St. Thomas' reliance on Flagg just as this Court previously treated St. Thomas' reliance on the EBay case (i.e. inapplicable).

Similarly, in the Ridell case, an officer of the company, in furtherance of the corporate officer's functions as a corporate officer, apparently made recordings of telephone conversations and then gave those recordings to counsel for the company. The company then contended that the tapes were personal property of that officer and thus the tapes should have been sought by serving a Subpoena on the officer himself. Not surprisingly, the Ridell court disagreed and held that the tapes, created in furtherance of the officer's functions, were in the control of Ridell. Quite obviously, this is not the case here. In this case, the government produced material to individual defendants, who are officers or directors of MSM, in the context of those individuals being defendants in a criminal action. However, since the government did not produce anything to MSM, the company MSM lacks possession, custody or control over the materials produced to the individual defendants.

B. A Protective Order Should Issue Prohibiting Any Party From Seeking Production of Material Produced By The Government to The Individual Defendants In the Criminal Matter From MSM.

In the context of St. Thomas' previous motion to obtain over eight million pages of materials produced by the government to individual defendants, the individuals moved for a protective order, seeking a prohibition on anyone seeking any material produced to the individuals by the government. Although at that time, and in that context, this Court declined to issue a protective order, MSM urges this court to issue a protective order, prohibiting any party from seeking materials *from MSM* which were produced by the government to individual defendants. As more specifically set forth above, MSM has not received discovery material from the government and as such MSM should not have to continue to engage in motion practice as to that issue. (MSM is not requesting that the protective order prohibit parties from seeking material

in MSM's possession, custody, or control. So long as those efforts complied with MDL Order No.1482, which limits discovery against Settling Defendants to information relevant to the defense of, or prosecution of, third-party claims, all rights under the Federal Rules of Civil Procedure would remain available to all parties).

WHEREFORE MSM PRAYS that this Honorable Court deny St. Thomas Entities' Motion to Compel Medical Sales Management, Inc. to Produce Certain Documents and issue a protective order prohibiting any party from seeking materials from MSM which were produced by the government to individual defendants.

Dated: October 2, 2015

Respectfully submitted,
DEFENDANTS MEDICAL SALES
MANAGEMENT, INC. AND MEDICAL
SALES MANAGEMENT SW, INC.,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2015, a true copy of the foregoing was filed in accordance with the Court's Electronic Filing Guidelines and will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Dan Rabinovitz
Dan Rabinovitz, Esq.